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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARTHUR MOORE, as Successor-In-Interest to Decedent XAVIER "KAYLA" MOORE, Plaintiff, vs. CITY OF BERKELEY, *et al*, Defendants.	Case No. 3:14-cv-00669-CRB **NOTICE OF MOTION AND PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FRCP 37(c)(1) TO INFORM THE JURY OF DEFENDANT'S FAILURE TO DISCLOSE DOCUMENTS AND TO STRIKE EXPERT GARY VILKE, M.D.** Pretrial Conf. Date: October 18, 2017 Time: 10:00 AM Judge: Hon. Charles R. Breyer Place: Courtroom 6, 17th Floor, 450 Golden Gate, San Francisco Trial Date: November 6, 2017

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT Plaintiff Arthur Moore (for the purpose of this motion, "Plaintiff") hereby moves for sanctions against Defendant City of Berkeley pursuant to Federal Rules of Civil Procedure 37 and 26(b)(4)(A).

This motion specifically targets the following categories:

1. Defendant City of Berkeley's failure to disclose and supplement discovery pursuant to FRCP 37(c)(1) in violation of FRCP 26(e).

2. Defendant City of Berkeley's failure to produce expert witness Gary Vilke, M.D. for deposition pursuant to FRCP 37 (c)(1) in violation of FRCP 26(b)(4)(A).

This Motion is based on two independent causes for sanctions.

The first is that Defendants' failed to disclose and supplement discovery documents covered by Plaintiff's Requests for Production of Documents, No. 12-13. The requested, non-disclosed and recently discovered documents are vital to Plaintiff's case-in-chief. The Defendant's non-disclosure significantly prejudiced Plaintiff's ability to prepare his case and Defendant's failure is neither harmless nor substantially justified.

The second cause for sanctions against Defendant arises from its failure to produce their expert witness, Gary Vilke, M.D. for his October 13, 2017 deposition in accordance with FRCP 26(b)(4)(A). The willful non-appearance substantially prejudices Plaintiff's ability to prepare and defend his case. and Defendant's failure is neither harmless nor substantially justified.

This Motion is based on the Notice of Motion, the Memorandum of Points and Authorities, the records and files of this Court, and upon such other oral and documentary evidence as may be presented at the time of the hearing.

Respectfully submitted,

Dated: October 16, 2017

The Law Offices of John L. Burris

/s/Adante D. Pointer
Adante D. Pointer
Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. BRIEF FACTUAL CONTEXT

a. Defendant's Failure to Disclose Documents

On February 12, 2014, Plaintiff Arthur Moore filed a complaint with eleven causes of action. Docket #1. Plaintiff has amended this complaint twice, however the cause of action under the ADA and the allegation officers failed to accommodate Decedent Kayla Moore's disabling condition of paranoid schizophrenia remained the same. See Docket #18, 31. This Court dismissed ten of the eleven causes of action in its Summary Judgment Order. See Docket #71. The only remaining cause of action is Plaintiff's cause of action, brought on behalf of Decedent Kayla Moore, for a violation of Title II of the American Disabilities Act against the Defendant City of Berkeley.

Approximately two weeks ago in preparation for trial Plaintiff discovered a document through independent research, Berkeley Police Department General Order T-19: Americans with Disabilities. Plaintiff had sent a Request for Production of Documents, No. 12, Set One in February of 2015 that requested this document and documents of this kind that relate "interaction with and/or detention of, subjects with known or suspected mental illness." See Plaintiff's Request for Production of Documents, No. 12 hereto attached as **Exhibit A**. Defendant in its response in March of 2015 asserted to have produced all responsive documents to this request. See Defendant's Response to Plaintiff's Request for Production of Document No. 12 hereto attached as **Exhibit B**. This document was not, and has not to date, been disclosed by Defendant City of Berkeley to Plaintiff Arthur Moore.

b. Defendant's Failure to Disclose Expert Witness Testimony

In a series of emails, the parties coordinated expert depositions prior to trial for Plaintiff's expert Dr. Spitz and Roger Clark and Defendant's experts Don Cameron, Dr. Vilke and Dr. Karch. See the Parties' e-mails, pages 1-22, herein after referred to as "Emails", hereto attached as **Exhibit C**.

On July 31, 2017, Plaintiff informed Defendant that Plaintiff's expert witness Dr. Spitz required his invoice be paid by Defendant in connection with his deposition**. Emails, 7**. Defendant responded:

"We will have a check to present to you at the deposition but we do not agree to prepay, or to pay a flat fee. 'Unlike ordinary witness fees, no rule requires that an opposing expert's deposition on fees be tendered to the witness in advance.' Schwarzer & Tashima, Federal Civil Procedure Before Trial, 11:458.1." **Emails, 7.**

Accordingly, Dr. Spitz's deposition was taken by video conference in Michigan and Defendant did not present a check to Dr. Spitz at the start of deposition. Rather, Defendant mailed a check after the deposition was concluded to Dr. Spitz for his hourly rate and Plaintiff paid the $500 difference between Dr. Spitz's flat fee for depositions and Defendant's payment for the hours deposed.

On August 22, 2017 Defendant scheduled to take Plaintiff's police practice expert Roger Clark's deposition in San Diego, CA. Plaintiff's counsel traveled from our Oakland Office to San Diego to defend the deposition in person. The morning of the deposition, within approximately an hour and a half before its start time, Defendant advised Plaintiff that they had to reschedule the deposition due to an unforeseen emergency. Plaintiff did not balk and instead made prompt arrangements to produce Mr. Clark at a mutually convenient later date.

Thereafter, the parties agreed for the deposition of Roger Clark to proceed on September 6, 2017 via video conference. Plaintiff's counsel once again traveled to San Diego for the deposition. Defendant did not. At the conclusion of the deposition, Defendant mailed Mr. Clark a check.

On October 12, 2017, Plaintiff informed Defendant that Plaintiff intended to take Defendant's expert Dr. Vilke's deposition by video conference. Defendant demanded that Plaintiff pay *in advance*. **Emails, 2, 5, 6.**

Plaintiff reminded Defendant of their own position that "no rule requires that an opposing expert's deposition on fees be tendered to the witness in advance." ' Schwarzer & Tashima, Federal Civil Procedure Before Trial, 11:458.1. **Emails, 6.** Plaintiff also reminded Defendant that in the deposition of both of Plaintiff's experts, Clark and Spitz, Defendant failed and/or refused to tender the expert's demanded deposition fees prior to deposition. **Emails, 4.**

Nevertheless Defendant insisted that Plaintiff pay Defendant's expert's flat fee of $2000 prior to the start of deposition. **Emails, 1, 5.** This is both a flat fee and an advanced payment – therefore Plaintiff declined, but reassured Defendant that a check would be mailed afterwards.

Defendant responded with a highly offensive assertion that Plaintiff Counsel's "behavior tells [Defendant's counsel] that [Dr. Vilke's] inclination on payment is correct, and that [Plaintiff's Counsel] may indeed not pay him his fee." **Emails, 3.**

Plaintiff considers this an extremely inappropriate comment by Defendant's counsel, given Plaintiff's office had only recently deposed Dr. Vilke in another matter in February of 2016. In that case, Plaintiff's associate, Ben Nisenbaum mailed Dr. Vilke's payment after the conclusion of the deposition based upon his hourly fee. Dr. Vilke never raised an issue with this method and/or form of payment. In light of the foregoing, Defendant counsel's assertion that both Defendant's counsel and their expert have some preconceived suspicion that Plaintiff's counsel will not pay his deposition fees lacks any factual basis, demonstrates unprofessional conduct and perhaps a racist mindset as the only difference between Mr. Nisenbaum and Mr. Gray is their skin color wherein one attorney was afforded professional courtesy and trust while the other was denied the same degree of professionalism for no apparent good reason.

On October 13, 2017, Plaintiff attempted to depose Defendant's expert Dr. Gary Vilke. Dr. Vilke appeared at the deposition with Defendant's counsel present. A brief discussion was had off record to determine if Defendant was still going to refuse to produce Dr. Vilke for deposition without advance payment. Defendant maintained their position. The partied then went on record wherein Plaintiff stated he was ready to proceed with the properly noticed deposition and inquired whether Defendants were going to permit Dr. Vilke to testify. Defendant declined despite Plaintiff reminding them of the course of dealing between the parties regarding payment of their respective experts, the federal rules as well as the manner in which Dr. Vilke had been previously paid less than a year ago. Defendant nevertheless refused to participate in the deposition. See a rough transcript of Dr. Vilke's Deposition hereto attached as **Exhibit D**.

II. DISCUSSION

Federal Rules of Civil Procedure 26 largely governs the requirement and scope of discovery available to parties in the discovery process while Rule 37(c)(1) gives teeth to the requirements imposed by Rule 26 by forbidding the use at trial of any information that is not properly disclosed. *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) quoting *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*, 259 3d. 1101, 1106 (9th Cir. 2001).

The courts give "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which is "a recognized broadening of the sanctioning power." *Supra, Yeti* at 1106; see also R & R Sails, 673 F.3d at 1245 (same); Jeff D. v. Otter, 643 F.3d 278, 289 (9th Cir.2011) ("[A] district court has wide discretion in controlling discovery.") (alteration in original) (internal quotation marks omitted).

This is a "self-executing, automatic sanction to provide a strong inducement for disclosure of material." *Supra, Yeti* at 1106 (9th Cir. 2001) (internal punctuation omitted) (quoting Fed.R.Civ.P. 37 advisory committee's note (1993)). The harshness of this rule is ameliorated by the express exceptions that the information may be introduced if the failure to disclose the information was substantially justified or harmless. *Id*. The burden is on the party facing the sanction to show that the failure to disclose was harmless. *Id.* at 1107. The district court has wide latitude in issuing discovery sanctions under Rule 37(c)(1). *Id.* at 1106.

1. The Court Should Inform the Jury that Defendant's Failed to Produce the ADA Policy in Bad Faith Because the ADA Policy Was in Defendant's Possession, Covered by Plaintiff's Request and Defendant Was Aware of Its High Importance

Federal Rules of Civil Procedure 26 (e)(1) requires a party to supplement or correct its disclosure or response "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." FRCP 26(e)(1)(A). Here, Plaintiff filed his original complaint on February 12, 2014 and it included a cause of action for a violation of Title II of the American Disabilities Act. **See Docket #1, 18, 31**. On February 6, 2015 Plaintiffs served Defendants with a Request for Production of Documents that explicitly asked for:

"ALL City of Berkeley Police Department policies, orders AND directives, in use on the date of this INCIDENT PERTAINING TO interaction with and/or detention of, **subjects with known or suspected mental illness.**" See **Exhibit A** .Defendants responded on March 11, 2015 that they had disclosed all documents responsive to this request. See **Exhibit B**. However Defendants never disclosed, in all this time, the most crucial police policy in their custody: General Order T-19: Americans with Disabilities.

This was no mistake. Plaintiff alleged in his cause of action that Decedent Kayla Moore's disabling condition was her mental illness, paranoid schizophrenia. See Plaintiff's Second Amended Complaint, **Docket #31, page 2, 19-20**. Plaintiff's made a discovery request for policies that pertain to a subject with known or suspected mental illness. Nevertheless, Defendants did not produce the only police policy in their custody *titled* Americans with Disability Act, section 6: ***Mental, Emotional and Psychological Disabilities***. [emphasis added] See Berkeley PD General Order T-19 attached hereto as **Exhibit E**. The policy explicitly details all of the reasonable accommodations officers are required to make when detaining a person that suffers from a mental illness. It is telling that the Defendant City of Berkeley withheld this policy because it precisely demonstrates that officers violated their own training and policies which presumptively are designed to adhere and comply with the tenets of the ADA. Otherwise, Defendant would have used this policy to affirm and explain how each of its officers' actions were in accordance with their Department's mandates. Instead, Defendant withheld this dispositive policy in hopes that Plaintiff would never discover their officers' failures. Only after countless hours of independent research in preparation for the upcoming trial, just weeks away did

Plaintiff discover this crucial policy and is substantially prejudiced by its late discovery. Plaintiff cannot develop officer testimony, expert testimony or perform any other discovery in regards to this document.

FRCP 37(c)(1) provides the teeth to the mandates of the discovery process. FRCP 37(c)(1)(A-C) provide three possible remedies the court: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

Plaintiff moves that this Court enforce all three available options. First, the Court should order the payment of the reasonable expenses involved with the hours of research to discover this withheld document and to file this motion. Second, the Court should inform the jury of Defendant's failure to produce this document because otherwise Defendant's will have received the benefit of their malfeasance in prejudicing Plaintiff. Third, the Court should enforce Rule 37(b)(2)(A)(i) by directing the jury that the officers violated Berkeley Police Department General Order T-19: Americans with Disabilities, Section 6 - Mental, Emotional and Psychological Disabilities.

2. The Court Should Exclude Any and All Testimony from Expert Witness Dr. Gary Vilke Because Defendant Failed to Produce the Expert for Deposition on his Report and Opinions

"A party may depose any person who has been identified as an expert whose opinions may be presented at trial." FRCP 26(b)(4)(A). Rule 26 of the Federal Rules of Civil Procedure requires the party taking an expert's deposition to pay the expert a reasonable fee for time spent in responding to discovery in a deposition. FRCP (b)(4)(E)(i). However, Plaintiff is not required to pay a flat fee or payment in advance of the deposition of expert witnesses. *Schwarzer & Tashima*, Federal Civil Procedure Before Trial, 11:458.1. Here, Plaintiff was willing to pay, like Defendant, the expert for his testimony for the hours he spent being deposed and would calculate the fee afterwards. Defendant's expert's insistence to be paid a flat fee prior to deposition amounts to an impermissible payment in advance that Plaintiff had the legal right to refuse. Defendant was still required to produce their expert and Plaintiff had the right to depose him. Defendant expert's refusal to be deposed amounts to a failure to disclose and cooperate in the discovery process. Plaintiff is prejudiced by Dr. Gary Vilke's refusal to be deposed and that prejudice is significant given the proximity to trial and counsel's schedule leading up to it.

Federal Rules of Civil Procedure 37(c)(1) provides teeth and remedy to Defendant's failure to cooperate under Rule 26's discovery requirements. This Court should strike all testimony from expert Dr. Gary Vilke because his failure to be deposed is neither harmless nor substantially justified. Expert testimony from Dr. Gary Vilke speaks to the Decedent's cause of death and other critical issues in Plaintiff's case. Plaintiff's inability to depose and develop testimony from this expert results in substantial harm in Plaintiff's efforts to prove Plaintiff's case and defend it from Defendant's expert. Furthermore, the only reason given by Defendant and Defendant's expert for his unwillingness to testify at deposition is a suspicion that Plaintiff will not pay his fee afterwards. First, Plaintiff finds this 'suspicion' highly offensive and substantially *un*justified.

Plaintiff's counsel has already taken expert Dr. Vilke's fee at least once before and is not aware of any payment issues. Secondly, Plaintiff finds this suspicion to be rank with racial animosity and directed at Plaintiff's counsel's African-American background given that Defendant and their expert has offered no other basis for this "suspicion" and Dr. Vilke accepted his payment by mail at the conclusion of his deposition from Mr. Nisenbaum. Therefore Plaintiff moves this Court to sanction Defendant for the reasonable attorney fees in connection with the deposition, the research involved in uncovering the subject ADA policy and this motion. Further, Plaintiff moves this Court under FRCP 37(c)(1)(C) which provides this Court the discretion to exclude the witness testimony altogether under 37(b)(2)(A)(ii) and/or advise the jury of Defendant's malfeasance.

CONCLUSION

For the reasons above, the Court should grant Plaintiff's motion for sanctions pursuant to Federal Rules of Civil Procedure 37 (c)(1) to sanction Defendant City of Berkeley for failure to disclose critical documents and disclose expert testimony.

Dated: October 16, 2017

The Law Offices of John L. Burris

/s/Adante D. Pointer

Adante D. Pointer

Attorney for Plaintiff